UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

JOSEPH K. KLING
v.
DEPARTMENT OF JUSTICE

Docket No.
AT075299048

OPINION AND ORDER

We here review a presiding official's award of attorney fees under the Civil Service Reform Act (the Reform Act), 5 U.S.C. § 7701(g)(1) (1978). That provision authorizes the Board to require an agency to pay reasonable attorney fees incurred by a prevailing employee or applicant before the Board, when warranted in the interest of justice. By the Board's regulations, a presiding official is to rule upon motions for such awards in an addendum to the final decision, which is then subject to petition for review of that ruling alone. 5 C.F.R. § 1201.37(a)(2) (1979). Such review is granted or denied in accordance with the provisions of 5 C.F.R. § 1201.115 (1979).

I. THE FACTUAL BACKGROUND

In an interim decision which became final under 5 C.F.R. § 1201.113, the presiding official reversed the removal of appellant, Dr. Joseph K. Kling, a staff psychologist with the Department of Justice, Bureau of Prisons (the agency), who was charged with striking a prison inmate. With differing versions of the incident presented by several eyewitnesses, the presiding official found that appellant had struck the inmate but that he had done so accidentally, and concluded that the removal was not for such cause as will promote the efficiency of the service. The presiding official also found that appellant's allegation of disparate treatment was not substantiated.

Appellant's counsel thereupon filed a motion for attorney fees and costs, requesting that appellant be awarded fees of $3,705.00 and costs of $174.15. The fee amount represented a claimed total of 61.75 hours at the rate of $60.00 per hour. An affidavit and time compilation were submitted to support the motion.

The agency opposed the motion, asserting that no award was justified because there was no proof of bad faith, gross procedural error, or that the agency knew or should have known that it could

not prevail on the merits of the case.[1] There was, however, a genuine issue as to whether ill will toward appellant had prompted or influenced the agency's action. Appellant's department head, Dr. Bohn, had proposed the termination after conducting an investigation. Undisputedly, Bohn and appellant had their differences, both personal and professional.

The presiding official's Addendum Decision on the motion concluded that an award of attorney fees was warranted in the interest of justice, stating in pertinent part:

> [A]ppellant . . . and Bohn . . . were at odds because of a difference of approach to professional problems, professional jealousy, and competition by their respective wives for the same job. Yet, Dr. Bohn investigated the matter giving rise to charges which Dr. Bohn then preferred leading to the appellant's removal choosing to apparently disregard or give little credence to the testimony of Inmate Warren. Although I do not conclude that Dr. Bohn's action was taken for reasons of malicious mischief, I do conclude that some other agency official not unfriendly toward the appellant could well have come to a different conclusion than that of Dr. Bohn. I find that the award of attorney fees may be granted by a presiding official where ill will by an agency official or negligence by the same official played a part in the action decided upon by the agency.

The agency had not contested the amount claimed, and the presiding official allowed the total amount claimed for attorney fees and costs. The presiding official found that the amount was reasonable in light of counsel's unchallenged representations "regarding his experience, time and labor required, novelty and difficulty of questions, amount involved and results obtained, and length and nature of professional relationship with the client." The Addendum Decision included no evaluation or findings as to the application of any of these factors, and no specification or discussion of the costs included in the award.

The agency petitioned the Board to review the award. Appellant filed a response, and also a "cross-petition" seeking an additional $810.00 in fees for time spent on the original motion for fees and on the petition before the Board.[2] The Office of Personnel Management (OPM) as intervenor and the American Federation of Government Employees, AFL-CIO (AFGE), as amicus curiae have also filed briefs. Supporting the agency's petition, OPM contends that

[1] The agency's late response was accepted by the presiding official for good cause, since the Board had failed to serve timely the agency with a copy of appellant's motion as required by 5 C.F.R. § 1201.26(b).

[2] We do not rule on the request for additional fees in this decision. The request should be submitted to the presiding official upon remand.

ill will or negligence on the agency's part must have been the motivating factor in the agency's action before a fee award can be warranted. AFGE urges that the Board has broad discretion to make such awards.

DISCUSSION

The issues presented concern the scope of the Board's authority to review the award made by the presiding official, whether in this case an award of attorney fees is warranted in the interest of justice, and if so warranted, whether the amount awarded by the presiding official is reasonable. We conclude that our review authority is plenary, and that the Addendum Decision does not contain findings adequate to support a determination on either of the other two issues.

A. The Review Authority of the Board

Appellant contends that the Board has no jurisdiction to review a presiding official's award of attorney fees, citing the absence of any express provision for such review in § 7701(g)(1) which provides for such determinations to be made by "the Board, administrative law judge, or other employee, as the case may be . . ." By this construction, the Board's review and reopening authority under § 7701(e)(1) would be curtailed. We find this interpretation to be without merit.

This contention overlooks the fact that the authority of the Board's presiding officials is derived exclusively by delegation from the Board under § 7701(b). See *Weaver* v. *Department of Navy*, 2 MSPB 297 (1980). In fact, nothing in the Reform Act or its legislative history suggests that the review authority of the Board under § 7701(e)(1) is in any way limited or that the Board may delegate unreviewable adjudicative authority to any presiding official. On the contrary, 5 U.S.C. § 1205(f) empowers the Board to delegate without restriction only its "administrative" functions. The authorization of § 7701(e)(1)(B) for the Board to reopen case on its own motion, without the necessity of a petition for review by any party or the Director of OPM, demonstrates Congressional intent to vest ultimate responsibility for all Board adjudicative functions in the Board itself.

Finally, it is only by the Board's own procedural regulation, at 5 C.F.R. § 1201.37(a)(2), that presiding officials are directed to decide attorney fee issues in separate addendum decisions upon motion following final decisions on appeals. That regulation, issued pursuant to the Board's authority under § 7701(j) to "prescribe regulations to carry out the purpose" of § 7701,[3] expressly provides for Board review of such addendum decisions. The Board's authority

[3] *See also* 5 U.S.C. § 1205(a) and (g).

with respect to review of such decisions is thus coextensive with its authority under § 7701(e)(1) and with its authority under 5 U.S.C. § 1205(a)(1) to "adjudicate, or provide for the . . . adjudication, of all matters within the jurisdiction of the Board . . . and, subject to otherwise applicable provisions of law, to take final action on any such matter."

B. Interest of Justice

It is undisputed that appellant was the prevailing party and that an attorney-client relationship was established with his counsel pursuant to which legal services were performed on appellant's behalf in his appeal before the Board. *See O'Donnell* v. *Department of the Interior* 2 MSPB 604 (1980). The only remaining prerequisite to any award of attorney fees under 5 U.S.C. § 7701(g)(1) is a determination that such award is "warranted in the interest of justice." *See Allen* v. *Postal Service,* 2 MSPB 582 (1980).

In *Allen* we reviewed in detail the legislative history of the "interest of justice" standard and general categories of circumstances which may warrant an award under that standard.

The substantial discretion which *Allen* finds accorded to the Board under § 7701(g)(1) is considerably broader than that suggested by the agency or OPM in this case. Nevertheless, our discretion is not quite so broad as to permit approval of the cryptic explanation and supporting findings set forth in the Addendum Decision, with nothing more.

In *O'Donnell,* we held a fee award to be warranted where agency officials unjustifiably failed to undertake prudent factual inquiries which would have led the agency to discover at the outset that the removal action was wholly unfounded. But that is far from the view that an award is warranted when a more friendly agency official could have come to a different conclusion in proposing an employee's removal, or when a recommending official's simple negligence or ill will short of malice played "a part" in the agency's action, as the Addendum Decision here indicates. It may be that Dr. Bohn's ill will toward appellant was of sufficient magnitude and effect upon the agency action to justify a fee award, but we cannot ascertain that from the Addendum Decision's sparse findings and explanation. Certainly, it would be erroneous to conclude that a fee award is warranted merely because Bohn and appellant had some differences.

Since the presiding official did not have available our *Allen* and *O'Donnell* opinions in ruling upon the motion for fees, and we cannot tell from the Addendum Decision whether he would reach the same conclusion in light of those opinions, we will remand for reconsideration by the presiding official. Upon such remand, the

presiding official should bear in mind that decisions on fee awards require pertinent findings of fact and a fully articulated, reasoned judgment, equally with decisions on the merits of an appeal.[4] *Allen v. Postal Service, 2 MSPB 582 (1980).*

C. Reasonable Fees

Upon remand, if the presiding official adheres to the conclusion that a fee award is warranted, the reconsidered addendum decision should set forth more specifically the basis on which a determination of reasonable fees is made. While the agency's failure to contest the amount claimed may relieve a presiding official of the need to resolve disputed factual issues,[5] it cannot relieve that official or the Board of the statutory duty to assure that only "reasonable attorney fees" are awarded. 5 U.S.C. § 7701(g)(1). Since the Board has not previously addressed this question, we set out here the principles which should guide the determination of a reasonable fee award.

Two elements are essential to the determination of the amount of a "reasonable" attorney fee: identification of the pertinent factors to be considered, and a rational analysis taking proper account of those factors. In addition, clear and adequate findings of fact in the addendum decision are necessary to establish the factual predicates on which, and to illuminate the reasoning by which, the pertinent factors have been applied. Fortunately, a substantial

[4] It should be noted that the Addendum Decision was grounded in part on the finding that Bohn chose to "disregard or give little credence to the testimony of Inmate Warren." It is not clear in the record that this finding has any substantial evidentiary support. The presiding official should reconsider the evidence, since this finding is a factor to be considered in determining whether a fee award is appropriate, for if Bohn was unaware that Warren had witnessed the incident he could not have considered Warren's evidence in proposing appellant's removal. In addition, although the Initial Decision found that Warren's credibility had not been challenged, the presiding official should consider whether a reasonable and impartial supervisor in the position of Bohn or of the Regional Director must necessarily have accepted Warren's credibility. The presiding official should also consider whether there is any evidence adequate to conclude that Bohn sought to bias the agency's Regional Director, who made the removal decision, or that the Regional Director did not have before him a fair and complete summary of the evidence favorable to appellant.

[5] Experience thus far in considering motions for fees indicates that agencies regularly oppose any award of fees but fail to address the reasonableness of the particular amount claimed in responding to the motion before the presiding official, as in this case. Since the Board normally does not review issues which have not been raised before its presiding official, especially when such issues turn upon disputed factual matters which have not been presented to that official for resolution, the agency thereby risks waiver of its opportunity to seek Board review of the reasonableness of a fee cognizant of the need to address all pertinent issues, with rebuttal evidence as well as argument, in responding to motions under 5 C.F.R. § 1201.37(a).

body of federal case law, developed through experience with a variety of statutory fee award provisions as well as discretionary awards under judicial equity powers, offers guidance in all these respects.

The general factors to be considered are set forth and elaborated in some detail in *Johnson* v. *Georgia Highway Express, Inc.* 488 F.2d 714 (5th Cir. 1974).[6] The *Johnson* decision has received general

[6] The *Johnson* factors, based on the American Bar Association's Code of Professional Responsibility, Ethical Consideration 2-18 and Disciplinary Rule 2-106, may be summarized as follows:

1. *Time and labor required.* Hours claimed must be weighed against the judge's own knowledge and experience of the time required for similar activities. The possibility of duplication of efforts should be scrutinized. Legal work should be distinguished from non-legal work, which commands a lesser rate.

2. *Novelty and difficulty of issues.* A case of first impression requires more research, which deserves compensation, but time merely devoted to learning a new field of law is an investment for future cases.

3. *Skill requisite to perform the legal service properly.* Observation of the attorney's work product, preparation, and ability are important to this factor.

4. *The preclusion of other employment due to acceptance of the case,* through foreclosure of other business due to conflicts of interest or through inability to use time spent on the client's behalf for other purposes.

5. *The customary fee for similar work in the community.*

6. *Whether there is a fixed or contingent fee.*

7. *Time limitations imposed by the client or circumstances.* Some premium should be recognized for priority work which delays the attorney's other work.

8. *Amount involved and result.* The amount of damages, for example, may be considered, but is not controlling. The effect of the case on the development of the law, or in benefitting similarly situated persons, should be considered.

9. *The experience, reputation and ability of the attorney.* Expertise in a specialized field, and demonstrated skill and ability are pertinent.

10. *The undesirability of the case.* Where an unpopular case has been undertaken which may have an economic impact on the attorney's practice, this factor can be considered.

11. *The nature and length of the professional relationship with the client.* A lawyer or firm may vary the fee in light of the professional relationship with the client.

12. *Awards in similar cases.*

We note, however, that this summary is not a substitute for study of *Johnson* itself and other leading cases on this subject.

recognition as defining factors affecting the value of an attorney's services.[7]

The *Johnson* approach alone, however, provides no analytical framework within which to evaluate and apply the pertinent factors rationally and consistently, especially since many of those factors are overlapping or duplicative and others are quite subjective, at least when considered on an isolated basis.[8] Alternatively, such a framework is provided by a line of decisions commencing with *Lindy Bros. Builders, Inc.* v. *American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973). *See e.g., Northcross* v. *Board of Education*, 611 F.2d 624 (6th Cir. 1979); *Hughes* v. *Repko*, 578 F.2d 483 (3d Cir. 1978); *King* v. *Greenblatt*, 560 F.2d. 1024 (1st Cir. 1977), *cert. denied*, 438 U.S. 916 (1978); *National Treasury Employees Union* v. *Nixon*, 521 F.2d 317 (D.C. Cir. 1975); *Grunin* v. *Int'l House of Pancakes*, 513 F.2d 114 (8th Cir. 1975), *cert. denied*, 423 U.S. 864 (1976); *City of Detroit* v. *Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974).

These cases recognize that most of the *Johnson* factors are accounted for by two objective variables: the lawyer's customary hourly billing rate and the number of hours devoted to the case. Once these two variables have been scrutinized and evaluated, their mathematical product can be obtained by simple multiplication. Other special factors not adequately reflected in the attorney's time and hourly rate, such as quality of professional performance, unusual time constraints, an unusually unpopular cause, and a contingency factor when the attorney has agreed to be paid only if successful, can then be applied when justified to adjust the result.

Most of the cases appealed to the Board are neither as lengthy nor as complex as the typical federal litigation involving fee awards, and both Congressional intent and the Board's regulations require expedition in resolving the great volume of cases heard by the Board's presiding officials. The relative simplicity of the *Lindy* approach, as developed and elucidated in the other cases cited, and

---

[7] In fact, *Johnson* was recommended as an example of a method of determining reasonable attorney fees when the Civil Rights Attorney's Fees Award Act of 1976 was considered by the House Judiciary Committee. *See* Pub. L. No. 94-559, 90 Stat. 264 (amending 42 U.S.C. § 1988); H. Rep. No. 94.1558, 94th Cong., 2d Sess. 8 (1976). *Accord*, S. Rep. No. 94.1011, 94th Cong., 2d Sess. 6, *reprinted in* (1976) *U.S. Code Cong. & Admin. News*, 5908, 5913.

[8] See Berger, *Court Awarded Attorney's Fees: What Is "Reasonable"?*, 126 *U. Pa. L. Rev.* 281, 286 (1977):

> [T]he fundamental problem with an approach that does no more than assure that the lower courts will consider a plethora of conflicting and at least partially redundant factors is that it provides no analytical framework for their application. It offers no guidance on the relative importance of each factor, whether they are to be applied differently in different contexts, or indeed, how they are to be applied at all.

its greater susceptibility to analysis and proof, are well suited to the needs of the Board in applying 7701(g)(1). Accordingly, we adopt the approach represented by the *Lindy* line of cases. We recognize, however, that the factors set forth in *Johnson* may provide useful guidance in implementing that approach.

We caution, however, that the presiding official must scrutinize with due care the hours and the billing rates claimed by counsel in supporting their motions for attorney fees. The presiding official may cut hours for duplication, padding, or frivolous claims, and impose fair standards of efficiency and economy of time.[9] Such evaluation obviously requires adequate information as to the way in which counsel's time was spent (discovery, legal research, interviewing witnesses,appearance at a hearing, preparation of motions or briefs, etc.).[10] Billing rates should be evaluated according to the individual attorney's professional standing, experience, status (general partner, junior partner, associate), and specalized expertise.[11] The presiding official must include in the addendum decision findings adequate to substantiate the determination of the approriate billing rates and compensable hours.

Any adjustment to the amount derived from multiplying the hourly rate by the number of compensable hours should also be identified in the addendum decision and the basis carefully explained. In this regard, we note that the purpose of § 7701(g)(1) is to assure that legal expense is not a barrier to the representation of employees and applicants for employment who have just cause for appeal. Accordingly, a public policy "bonus multiplier" for counsel is not justified in a Board award of attorney fees in an employee appeals case. It may nevertheless be appropriate, when counsel's compensation is contingent on success, to adjust the award upward to compensate for the risk the attorney is accepting of not being paid at all.[12]

With the foregoing guidelines in mind, we conclude that the Addendum Decision in this case does not contain sufficient findings or reasoning to support a determination on reasonableness of fees awarded. The conclusory finding that the amount claimed was reasonable "in light of representations by the attorney" does not identify how the factors pertinent to the award were evaluated in determining the hourly rate or the compensable hours.

---

[9] *See, e.g., Northcross* v. *Bd. of Educ.*, 611 F.2d at 636; *Bachman* v. *Pertschuk*, 19 EPD ¶9044 (D.D.C. 1979); *Comment, Court Awarded Attorney's fees and Equal Access to the Courts, 122 U. Pa. L. Rev.* 632, 703-05 (1974) [hereinafter cited as *Attorney's Fees*].

[10] *E.g., City of Detroit* v. *Grinnell*, 495 F.2d at 471.

[11] *E.g., Northcross* v. *Bd. of Educ.*, 611 F.2d at 638; *City of Detroit* v. *Grinnell*, 495 F.2d at 471; *Lindy Bros. Builders, Inc.* v. *Am. Radiator & Standard Sanitary Corp.*, 487 F.2d at 167.

[12] *E.g., Northcross* v. *Bd. of Educ.*, 611 F.2d at 638; *see also* the second *Lindy* decision, 540 F.2d 102, 115-18 (3d Cir. 1975); *Attorney's Fees, supra* note 9 at 708-11.

If the presiding official had analyzed the fee claim in a manner similar to that adopted above, the factors generally referred to in the Addendum Decision would have been evaluated in the determination of reasonable rate and hours. For example, the attorney's experience would be relevant to determining the hourly rate charged. The complexity or novelty of the issues, and the various legal services performed, would be relevant in ascertaining the reasonable number of compensable hours. The Addendum Decision contains no information adequate to permit review of any of those factors.

If the "results obtained" was a factor in the presiding official's determination, as the Addendum Decision indicates, the reconsidered decision should explain how and why that factor affects the total amount awarded, since that factor is not reflected in an attorney's customary hourly rate. Insofar as the results obtained are reflected indirectly by the number of hours devoted to the case, separate recognition of that factor may be duplicative and must be justified as an adjustment to the normal fee for unusual quality of performance or difficulties overcome. Absent such unusual circumstances or evidence that the case was undertaken on a contingent fee basis, mere success on an appeal does not warrant an adjustment in the normal fee, since the "prevailing party" requirement of § 7701(g)(1) makes such success a prerequisite to award of any fee at all.

The length and nature of the attorney-client relationship, also referred to in the Addendum Decision, may sometimes be a factor in determining a reasonable hourly rate, for example, when the rate is reduced because of a past business relationship or because the attorney anticipates further business, as appeared to be the case in *O'Donnell* v. *Department of Interior*, 2 MSPB 604 (1980). The applicability of that factor to this case needs to be explained, as does any variation above the amount actually billed to appellant, which would have to be fully justified as we have held in *O'Donnell*.

Using the mode of analysis described above, the presiding official should identify the relevant factors and evaluate their impact on the hours and rate claimed, and any other factors warranting adjustment of the result produced by rate times compensable hours. The particular facts and circumstances of the parties and attorneys will necessarily vary from case to case, but the method of determining a reasonable fee award should not vary. A reasoned analysis with factual support in the record is always required.

III. CONCLUSION

The presiding official erred in the Addendum Decision in failing to make adequate findings and to provide adequate reasons for the

determination of whether the interest of justice warrants an award of attorney fees, and in failing to make findings adequate to support a determination of the reasonableness of any such amount awarded.

Accordingly, the petition for review is GRANTED, the presiding official's Addendum Decision is hereby VACATED, and this case is hereby REMANDED to the presiding official for reconsideration of appellant's motion for attorney fees consistent with this Opinion.

RUTH T. PROKOP,
Chairwoman.

ERSA H. POSTON,
Vice Chair.

RONALD P. WERTHEIM,
Member.

July 22, 1980.

BEFORE THE MERIT SYSTEMS PROTECTION BOARD

Atlanta Field Office

December 12, 1979

JOSEPH K. KLING
v.
U.S. DEPARTMENT OF JUSTICE

Addendum to Initial Decision AT075299048 and Order for Attorney Fees

Under section 1201.37 of the Board's regulations, the appellant's attorney in the above-stated cause has petitioned for the granting of attorney fees. Since the appellant is the prevailing party and the motion was made within 10 days of final date of a decision, under section 1201.113 of the Board's regulations the motion is properly before this Presiding Official.

Although the agency's responsive pleading authorized by section 1201.37(a)(2) was untimely, I waived the 10-day time limit for good cause shown. Therefore, I allowed the appellant's attorney an opportunity for surrebuttal. The attorney's motion and surrebuttal as well as the agency's responsive pleading have been considered by me in arriving at my Order contained hereinafter.

The Board's regulations at section 1201.37(a) state that the Presiding Official may require payment by the agency of reasonable attorney fees if the appellant is the prevailing party and payment is warranted in the interest of justice.

The agency contends that an award of attorney fees is not appropriate unless the agency has acted in bad faith, should have reasonably known that its action was clearly unwarranted, or has committed a gross procedural error. In its interpretation of the phraseology "in the interest of justice," the agency states that the intent of Congress was to limit such awards to those few cases where the agency: (1) acted in bad faith; (2) should have reasonably known that its action against the employee was clearly unwarranted; or (3) committed gross procedural error.

The appellant's attorney states that the agency ". . . urges a very strained position in contending that Congress intended to limit awards of attorney's fees to the three specified areas"; that as a general principle of law in statutory construction Congress is presumed to intend what it says; and that Congress did not provide that attorney's fees could be recovered only in those areas suggested by the agency. The appellant's attorney concludes from the language "this shall include but not be limited to . . .," that the Congressional intent is to vest the Presiding Official with a broad range of discretion.

I am persuaded by the position taken by the appellant's attorney in this matter.

In this case, the record reveals that the appellant and his immediate superior, Dr. Martin J. Bohn, Chief of the Psychology Department at the Federal Correctional Institution, Tallahassee, were at odds because of a difference of approach to professional problems, professional jealousy, and competition by their respective wives for the same job. Yet, Dr. Bohn investigated the matter giving rise to charges which Dr. Bohn then preferred leading to the appellant's removal choosing to apparently disregard or give little credence to the testimony of Inmate Warren. Although I do not conclude that Dr. Bohn's action was taken for reasons of malicious mischief, I do conclude that some other agency official not unfriendly toward the appellant could well have come to a different conclusion than that of Dr. Bohn. I find that the award of attorney fees may be granted by a Presiding Official where ill will by an agency official or negligence by the same official played a part in the action decided upon by the agency. That being so, in the interest of justice the appellant's attorney should be granted attorney fees in this case.

Being that the computation of fees in Exhibit A, including costs in Exhibit B, of the attorney's motion is not challenged by the agency, and in light of representations by the attorney regarding his experience, time and labor required, novelty and difficulty of questions, amount involved and results obtained, length and nature of professional relationship with this client, I find the amount requested to be reasonable attorney fees. I therefore find

that the claim of $3,879 for attorney fees is warranted in the interest of justice and Order that it be paid by the agency.

Under section 1201.37(a)(2) of the Board's regulations, the parties are advised that a petition for review by the Board of this issue alone shall be submitted within 30 days of the receipt of the Presiding Official's determination.

RONALD M. SUTHERLAND,
Presiding Official.

☆ U.S. GOVERNMENT PRINTING OFFICE : 1981 O—323-586